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SUPREME COURT OF THE UNITED STATES
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THE UNIVERSITY OF TEXAS AT EL PASO,
Petitioner

v.

ELEANOR DUKE,
Respondent

* * * * * * * * *

On Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit
Brief for Respondent

* * * * * * * * *

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QUESTIONS PRESENTED

1. Whether a female faculty member alleging sex discrimination with regard to promotions, pay disparity, and job assignments who seeks to represent a class of other female faculty members with identical claims is entitled to conduct any discovery on employment practices in the academic departments which employ class members.

TABLE OF CONTENTS

QUESTIONS PRESENTED.....i

STATEMENT OF THE CASE.....1

SUMMARY OF THE ARGUMENT.....4

REASONS FOR NOT GRANTING THE WRIT.....6

CONCLUSION.....23

CERTIFICATE OF SERVICE.....25

AUTHORITIES

CASES: Page

Burns v. Thiokol Chemical Corp.,
483 F.2d 300 (5th Cir. 1973).....7

Cooper v. Federal Reserve Bank
of Richmond, ____ U.S. ____,
104 S.Ct. 2794 (1984).....14,15,16,18

Duke v. UTEP, 729 F.2d 994
(5th Cir. 1984).....7

East Texas Motor Freight System
v. Rodriguez, 431 U.S. 935
(1977).....6,12

Fleming v. Travenol Laboratories, Inc.,
707 F.2d 829 (5th Cir.1983)....21,22,23

General Telephone Company
v. Falcon, 457 U.S.
147 (1982).....6,12,20,21,22,23

Johnson v. Georgia Highway Express Inc.,
417 F.2d 1122 (5th Cir. 1969).....20

Person v. Terminal Transport Company,
634 F.2d 989 (5th Cir. 1981).....20

Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981).....14,15

Trevino v. Celanese Corp., 701 F.2d 397, 406 (5th Cir. 1983).....7

United States Postal Service Board of Governor v. Aikins, 460 U.S. ____, 103 S.Ct. 1478 (1983).....18

FEDERAL RULES OF CIVIL PROCEDURE:

23(a).....22
50.....24

STATEMENT OF THE CASE

Respondent accepts the Statement of the Case submitted by Petitioner, with three exceptions. First, the Petitioner's Statement, on Page 3 of its Brief, that the EEOC issued a Right to Sue Letter to Doctor Duke should also indicate that the EEOC additionally issued its Determination, which included, in part, a reasonable cause finding that class wide sex discrimination had occurred as alleged in Dr. Duke's charge.

Second, the Respondent strongly takes issue with the Petitioner's contention on Page 4 of its Brief that the Class

Certification Hearing held on May 19, 1982, confirmed the fact that decisions with respect to pay, promotion, tenure and other conditions of employment were made within various departments. The record is strongly to the contrary. Dr. Olander, the Vice President for Academic Affairs, testified that every faculty promotion or salary adjustment proposal crossed his desk and was reviewed by him. He further testified that he applied uniform standards to review all such proposals regardless of the department affected.

Third, Petitioner omits crucial dates. Although the parties briefed their discovery dispute and were prepared to

argue it on May 19, 1982, the District Court declined to hear it at that time. It denied Plaintiff's discovery requests at approximately 4:30 PM on October 18th, and forced Plaintiff to trial at 9:00 AM, October 19th. This eleventh hour discovery denial was the error addressed by the Fifth Circuit.

SUMMARY OF THE ARGUMENT

The Petitioner's detailed dissertation on the current status of the law as to class actions in Title VII cases, is misplaced, and at best premature. The Court of Appeals decided that Respondent was entitled to the discovery which she requested prior to the hearing on class certification and prior to the trial on her individual claim, and that is all that it decided. The question of class certification has not yet been reached in light of the Court's ruling, since Respondent must first have the benefit of the discovery which she had been previously denied. Petitioner's attempt to

characterize the issues raised by the Court of Appeals' decision as involving continued adherence by the Fifth Circuit to the "across-the-board" class action approach is inaccurate and superfluous.

REASONS FOR NOT GRANTING THE WRIT

I.

THE DECISION OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT DEALS PURELY WITH DISCOVERY ISSUES AND IS IN NO WAY INCONSISTENT WITH THIS COURT'S DECISIONS IN EAST TEXAS MOTOR FREIGHT SYSTEM V. RODRIGUEZ, 431 U.S. 935 (1977) AND GENERAL TELEPHONE COMPANY V. FALCON, 457 U.S. 147 (1982).

This is a case about a Plaintiff's right to discovery. The Petitioner's attempt to categorize it as a resurrection of the "across-the-board" class action rule of the Fifth Circuit is completely without support. Unlike East Texas Motor Freight, supra, the Court of Appeals in this case did not certify this litigation as a class action, did not determine that there was

class wide liability, nor did it even make a ruling on the merits of Dr. Duke's individual claim. It simply held that Dr. Duke was entitled to conduct meaningful discovery.

Respondent believes that the law clearly allows for the conducting of discovery on class certification issues, Trevino vs. Celanese Corp., 701 F.2d 397, 406 (5th Cir. 1983); and Burns vs. Thiokol Chemical Corp., 483 F.2d at 300, at 304-05 (5th Cir. 1973), and the Petitioner has not challenged this principle. The denial of any class wide discovery was the error which required the Fifth Circuit's remand to the District Court. Duke v. UTEP, 729 F.2d 994 at 997 (5th Cir. 1984).

The Petitioner argues that the Record on Appeal "forcibly demolishes any possibility that there can be a class of University female faculty members who are victims of discrimination." (Page 7 Petitioner's Brief) The Petitioner chooses to not include in its version of the Record the EEOC Finding of reasonable cause to believe that the university discriminated on a class wide basis against females in the area of compensation, and which cited the following data, obtained from university budgets, in support.

I. Professors

Males		Females	
No.	Average Salary	No.	Average Salary
100	$17,047	3	$15,700

II. Associate Professors

Males		Females	
No.	Average Salary	No.	Average Salary
83	$14,041	4	$13,175

III. Assistant Professors

Males		Females	
No.	Average Salary	No.	Average Salary
111	$11,848	32	$10,613

IV. Instructors

Males		Females	
No.	Average Salary	No.	Average Salary
24	$9,118	26	$8,827

V. Lecturers

Males		Females	
No.	Average Salary	No.	Average Salary
1	$10,000	4	$9,275

The Petitioner also chose to omit the February 17, 1975, correspondence from the President of the University, which announced salary increases to female faculty members and stated in relevant part:

> "This increase is the result of the third comprehensive review of all University salaries. Two similar adjustments in base pay were made in April, 1973 and September, 1974. With the adjustments resulting from this final review, we believe that UT El Paso's salary levels have reached parity between the base pay of men and women. Next year we hope to be building merit pay increases on this salary structure within the limitations of appropriations."

Therefore, the Record on Appeal of the class certification hearing (which includes only that evidence which could be compiled without the beneift of <u>any</u> discovery) shows blatant class wide sex discrimination. The University budgetary figures led the EEOC to that conclusion. The University's own committee found eleven instances of gender

related pay disparity, and the University President stated that three overhauls of the salary structure were necessary to achieve parity between men and women. In light of this showing, the decision of the Court of Appeals that it was error to deny Dr. Duke the opportunity to conduct discovery on class action issues need not be reviewed by this Honorable Court.

II.

IT CERTAINLY CANNOT BE SAID AS A MATTER OF LAW, PRIOR TO CONDUCTING DISCOVERY OR DEVELOPING A FULL RECORD, THAT THIS CASE CANNOT PROCEED AS A CLASS ACTION.

Respondent must quickly point out that the class sought to be represented by Dr.

Duke is dramatically narrower than the classes in General Telephone Company of the Southwest v. Falcon,[1] supra, and East Texas Motor Freight Systems v. Rodriguez,[2] supra.

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[1] "The class of all hourly Mexican-American employees who have been employed, are employed, or may in the future be employed and all those Mexican-Americans who have applied or would have applied for employment had the Defendant not practiced racial discrimination in its employment practices." Falcon, supra, 102 S.Ct. 2364, at 2368.

[2] "All East Texas Motor Freight's Mexican-American and Black in-city drivers included in the collective bargaining agreement entered into between East Texas Motor Freight and the Southern Conference of Teamsters covering the State of Texas. Additionally that such class should properly be composed of all Mexican-American and Black applicants for line driver positions with East Texas Motor Freight from July 2, 1965, (the effective date of Title VII) to present." Rodriguez, supra, at 400.

In the present case, Plaintiff Duke sought to represent only female faculty members. She did not seek to represent nurses, secretaries, administrators, or any other female employees.

The entire class was located on one campus in El Paso, Texas. Dr. Duke did not seek to represent unsuccessful applicants for hire. Rather, the class would have been composed of female faculty members discriminated against while employed. Hence, there would be no litigation of any termination of employment issues.

Dr. Duke's particular grievances essentially fall into three clearly definable categories: (1) promotions; (2)

unequal pay; and (3) unequal work assignments. No member of the class had any claim or grievance other than the type suffered by Plaintiff. There was not a single claim of failure to hire, unlawful termination, or sexual harassment. Plaintiff's claims were not merely typical of the class claims. They were identical.

III.

THE COURT OF APPEALS' STATEMENTS CONCERNING THE PLAINTIFF'S BURDEN OF PROOF IS PERFECTLY CONSISTENT WITH TEXAS DEPARTMENT OF COMMUNITY AFFAIRS V. BURDINE, 450 U.S. 248 (1981) AND COOPER V. FEDERAL RESERVE BANK OF RICHMOND, ____U.S. ____, 104 S.CT. 2794 (1984).

The Petitioner challenges the following observation of the Court of Appeals which

it claims to be inconsistent with Texas Department of Committee Affairs v. Burdine, 450 U.S. 248 (1981).

> Had Duke's class claims prevailed, she would have faced a distinctly less onerous burden at the trial of her individual case. 729 F.2d, at 997.

This Honorable Court addressed the significance of class wide findings on individual claims in Cooper v. Federal Reserve Bank of Richmond, ____ U.S. ____, 104 S. Ct., 2794 (1984). In the Cooper case, there was a finding of no class wide discrimination which, under those facts, did not preclude the subsequent litigation of some individual claims. Concerning the future litigation of such individual claims, this Court pointed out that the Defendant Bank could utilize the prior class wide finding to its benefit, and stated:

> "the determination in the Cooper action that the Bank had not engaged in a general pattern or practice of discrimination would be relevant on the issue of pretext. Cooper, supra, at 2802."

Certainly the evidentiary value of a determination concerning a class wide practice of discrimination is not determined by the party in whose favor the determination was made. If a Defendant can utilize a finding of no class wide discrimination to bolster its arguments against pretext, a Plaintiff ought to be able to utilize a favorable finding of a practice of class wide discrimination to show pretext.

Hence, what was said by the Fifth Circuit in the instant case---that

prevailing on class claims can make an individual's trial burden less onerous---is perfectly consistent with this Court's holding that a Defendant can increase the onerousness of a Plaintiff's burden by showing the absence of a class wide practice of discrimination.

Certainly, the existence or non-existence of class wide discrimination is, if not determinative, then certainly relevant, on the issue of pretext. It is a circumstance which affects the credibilty of a Defendant's articulated reasons for a challenged employment decision. The credibilty of such a decision is frequently

the ultimate decision in a case. Cooper, supra, at 2799, United States Postal Service Board of Governor v. Aikins, 460 U.S. _____ at _____, 103 S.Ct. at 1482 (1983). Therefore, the Fifth Circuit was correct when it noted that the onerousness of Dr. Duke's burden would be lessened if she were armed with evidence of class wide discrimination because it is relevant to pretext.

IV.

PETITIONER'S FINAL ARGUMENT AS A REASON FOR REQUESTING THE WRIT RAISES ISSUES IN THIS COURT WHICH HAVE NOT BEEN ADDRESSED BY THE COURT OF APPEALS OR THE DISTRICT COURT, AND WHICH THEREFORE ARE INAPPROPRIATE AS GROUNDS FOR CERTIORARI.

The Petitioner's Argument, commencing on Page 14 of the Petition, challenges the

Court of Appeals' class certification practices, particularly with regard to what it alleges to be improper notice requirements. To date, no Court has determined that a class action is appropriate, and therefore no Court has addressed the question of the type of notice, if any, to be issued to potential class members. It is clearly inappropriate to raise in the first instance in this Court an issue which has not yet been presented, let alone addressed, in any lower court.

Furthermore, the Defendant challenges what it alleges to be "the law of the Fifth

Circuit" as evidenced by Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969) and Person v. Terminal Transport Company, 634 F.2d 989 (5th Cir. 1981).[3] What the Defendant is apparently challenging is the law of the Fifth Circuit prior to the Supreme Court's Ruling in General Telephone Company v. Falcon, supra. In doing so, Petitioner ignores the fact that this Court of Appeals has had those prior decisions already spoken to by this Honorable Court in Falcon.

Respondent suggests that if this Court is to consider the practice of the Fifth

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[3] Pages 15 and 16 of the Petition for Writ of Certiorari.

Circuit in cases other than the case presently pending, that it look at Fifth Circuit cases decided after the Falcon decision. One such case is Fleming v. Travenol Laboratories, Inc., 707 F.2d 829 (5th Cir. 1983) wherein the Court of Appeals addressed the very issue raised by Petitioner--the continued viability of the "across-the-board" class action rule--and squarely pronounced that rule to be dead. The Fifth Circuit stated:

> "Fleming's apparent reliance below on the Fifth Circuit's 'across-the-board' approach to Title VII class action suits is no longer legally sound. Although this Circuit formerly permitted victims of employment discrimination to maintain an 'across-the-board' attack on all unequal employment practices alleged to have been

> committed by the employer pursuant to a policy of discrimination, that practice was limited by the United States Supreme Court in General Telephone Company of the Southwest v. Falcon. In reversing the Fifth Circuit's allowance of an across-the-board class action attack, the Court stated explicitly that a 'Title VII class action, like any other class action, may only be certified if the Trial Court is satisifed, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisified.'" Fleming, supra, at 832-33.

Quite simply, the Petitioner is requesting this Honorable Court to correct a problem which has already been corrected. In the Falcon case, this Court effectively ended the Fifth Circuit's prior reliance on the "across-the-board" approach to class action issues in Title VII cases. Petitioner does not cite a single case

decided by the Fifth Circuit subsequent to Falcon wherein they have utilized the "across-the-board" theory. In the above cited provision from the Fleming case, there can be no doubt but that the Fifth Circuit has heeded the directive of this Court expressed in Falcon and pronounced the death of the "across-the-board" rule. Certiorari need not be granted if the only reason for doing so is to allow this Court to repeat a prior holding which is unmistakably being followed.

CONCLUSION

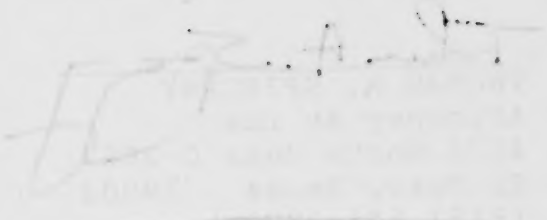
For the above stated reasons, Respondent believes that the Petition for Writ of

Certiorari should be denied with all costs being charged to the Petitioner in accordance with Rule 50.

Respectfully submitted,

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CERTIFICATE OF SERVICE

By affixing their signatures to the above and foregoing Brief for Respondent to the United States Court of Appeals for the Fifth Circuit, Thomas A. Spieczny and Antonio Cortez hereby certify that three true and correct copies of same have been served on this the 12th day of October, 1984, by United States Mail, postage prepaid, upon:

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